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CT INDAH CONSTRUCTION SDN BHD v. BHL GEMILANG SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
MARY LIM JCA
B HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: W-02(C)(A)-2056-10-2017]
25 OCTOBER 2019

C ***CONSTRUCTION LAW:*** *Adjudication – Payment claims – Claim for direct payment from developer – Whether developer liable as principal of main contractor to pay outstanding amount due to subcontractor – Whether mandatory for principal to pay adjudicated sum – Whether legal obligation arose – Whether requirement of law which principal had to comply with – Whether principal bound by statute – Construction Industry Payment and Adjudication Act 2012, s. 30(1), (2), (3)*
D *& (4)*

The appellant was a subcontractor in a project ('the project') while the respondent, as the developer, appointed BHL Builders as the main contractor for the project. The appellant commenced proceedings, under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'),
E against BHL Builders for sums which were outstanding for works done. The adjudicator decided in favour of the appellant and a principal sum of RM9,065,335.67, together with interests and costs, were awarded to the appellant. BHL Builders failed to settle the sum awarded in the adjudication decision within the stipulated time, prompting the appellant to issue a
F statutory demand under s. 218 of the Companies Act 1965 to BHL Builders for payment of the adjudicated sum. Pursuant to s. 30(1) of the CIPAA, the appellant issued a request to the respondent as BHL Builder's principal for direct payment of the sum awarded to the appellant. The respondent chose to remain silent despite the mandatory requirement of s. 30(2) of the CIPAA.
G The appellant filed an action in the High Court pursuant to s. 30 of the CIPAA for, *inter alia*, a declaration that the respondent was liable as the principal of BHL Builders to pay it the outstanding amount due under the adjudication decision. BHL Builders was wound up in the course of the High Court proceedings. The High Court, in dismissing the appellant's
H application, held that (i) there was no independent obligation and liability imposed on the respondent to make direct payment to the appellant, in the absence of clear words; and (ii) payment by the respondent to the appellant would amount to preferential payment in view of the fact that the main contractor, BHL Builders, was in liquidation. Hence, the appellant appealed.

I **Held (allowing appeal; setting aside decision of High Court)**
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) A legal obligation to pay may arise either by statute (as in the present case) or by contract. An obligation imposed by statute, in this case by s. 30(3) of the CIPAA, is stronger because, in the absence of proof of

payment by BHL Builders as requested by the respondent under sub-s. (2), it was mandatory for the respondent, as the principal, to pay the adjudicated sum of RM9,065,335.67 to the appellant. It is a requirement of law which the respondent had no discretion not to comply with it. (para 15)

(2) Payment made by the respondent to the appellant would not be from the assets of BHL Builders, but because the adjudicated sum was paid by the respondent, it would be a debt due from BHL Builders to the respondent (once the respondent makes direct payment to the appellant) which the respondent would have to recover from BHL Builders pursuant to sub-s. 30(4) of the CIPAA. (para 14)

(3) Section 30 of the CIPAA creates an independent statutory obligation on the part of the respondent, as a principal in its own right, to pay the appellant and that this was a separate obligation to pay imposed by statute which existed in parallel with BHL Builder's obligation as the main contractor to pay the appellant under the adjudication decision. Despite BHL Builder's status as a bankrupt, the respondent was bound by statute *ie,* s. 30(3) of the CIPAA, to make direct payment to the appellant of the adjudicated sum of RM9,065,335.67. (paras 16 & 22)

Case(s) referred to:

Gericevich Contracting Pty Ltd (in liq) v. Sabemo (WA) Pty Ltd (1984) 9 ACLR 452 ***(refd)***

Glow Heating Limited v. The Eastern Health Board, Patrick Rooney and Building and Engineering Limited (In Liquidation) [1988] IR 110 ***(refd)***

Golden Sand Marble Factory Ltd v. Easy Success Enterprise Ltd & Anor [1999] 2 HKC 356 ***(refd)***

JCT Limited v. Muniandy Nadasan & Ors And Another Appeal [2016] 3 CLJ 692 CA ***(refd)***

Re Wilkinson Ex parte Fowler [1905] 2 KB 713 ***(refd)***

Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd [1998] 4 CLJ 557 FC ***(refd)***

Veitchi Co v. Crowley Russell & Co [1972] SC 225 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 53

Companies Act 1965 (since repealed), ss. 218, 293

Companies Act 2016, ss. 528, 533

Construction Industry Payment and Adjudication Act 2012, s. 30(1), (2), (3), (4)

For the appellant - Foo Joon Liang; M/s Gan Partnership

For the respondent - Ng Sai Yeang & Wong Chee Chien; M/s Raja, Darryl & Loh

[Editor's note: For the High Court judgment, please see CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd [2018] 1 LNS 380 (overruled).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Abdul Rahman Sebli JCA:

[1] This appeal by the appellant CT Indah Construction Sdn Bhd was against the decision of the High Court dismissing its action pursuant to s. 30 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") for, *inter alia*, a declaration that the respondent was liable as the principal of BHL Builders Sdn Bhd ("BHL Builders") to pay it the outstanding amount due under the adjudication decision dated 13 October 2016. We allowed the appeal by a unanimous decision and these are our grounds.

[2] This appeal raises the efficacy of the direct payment remedy provided by s. 30 of CIPAA. The facts as set out by learned counsel for the appellant are not in dispute and they are as follows, with the necessary modifications. The appellant was a subcontractor in a project known as "The Mark" ("the project"). The respondent as the developer appointed BHL Builders as the main contractor for the project.

[3] The appellant commenced proceedings under CIPAA against BHL Builders for sums which were outstanding for works done. The learned adjudicator decided in favour of the appellant and a principal sum of RM9,065,335.67 together with interest and costs was awarded to the appellant. The adjudicated sum was to be paid by 21 November 2016. BHL Builders did not apply to the High Court to set aside the adjudication decision.

[4] BHL Builders failed to settle the sum awarded in the adjudication decision within the stipulated time, which prompted the appellant to issue a statutory demand under s. 218 of the Companies Act 1965 ("the Companies Act") to BHL Builders for payment of the adjudicated sum.

[5] Pursuant to s. 30(1) of CIPAA, the appellant's solicitors issued a request to the respondent as BHL Builder's principal for direct payment of the sum awarded to the appellant on 7 December 2016. The respondent did not issue a notice under s. 30(2) of CIPAA to BHL Builders to "show proof of payment" to the appellant nor "to state that direct payment would be made after the expiry of ten working days of the service of the notice". The respondent chose to remain silent despite the mandatory requirement of s. 30(2) of CIPAA.

[6] A winding-up petition dated 13 June 2018 was presented against BHL Builders by Lim Chin Electrical Engineering Sdn Bhd, a company unrelated to the appellant. BHL Builders was wound up in the course of the High Court proceedings.

[7] The issue before the High Court and before us was whether s. 30 of CIPAA is subject to the prohibition of preferential payment under s. 293 of the Companies Act, given the fact that BHL Builders had been wound up and is under receivership. The learned High Court Judge, in dismissing the appellant's application for direct payment from the respondent held as follows:

(i) There is no independent obligation and liability imposed on the respondent to make direct payment to the appellant, in the absence of clear words; and

(ii) Payment by the respondent to the appellant would amount to preferential payment in view of the fact that the main contractor, BHL Builders, was in liquidation.

[8] For ease of reference, we reproduce below both s. 30 of CIPAA and s. 293 of the Companies Act:

Section 30 of CIPAA

(1) If the party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.

(2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.

(3) In the absence of proof of payment requested under subsection (2), the principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour.

(4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.

(5) The section shall only be invoked if the money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1).

Section 293 of the Companies Act

293. Undue preference

(1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would

A in his bankruptcy under the law of bankruptcy be void or voidable shall, in the event of the company being wound up, be void or voidable in like manner.

(2) …

(3) Any transfer or assignment by a company of all its property to
B trustees for the benefit of all its creditors shall be void.

[9] It was argued by learned counsel for the respondent that the appellant is not entitled to seek direct payment from the respondent as BHL Builders had been wound up and is now under receivership. According to learned
C counsel, any payment to be made to the appellant would amount to undue preference in the appellant's favour. It was pointed out that the appellant is not the only creditor of BHL Builders as BHL Builders has 69 other creditors waiting in line to have their debts settled.

[10] It was further argued that s. 30 of CIPAA is akin to garnishee
D proceedings against the assets of BHL Builders and as such the appellant cannot, by virtue of s. 528 and s. 533 of the Companies Act 2016, seek the court's intervention to sanction an attachment of any debt due to BHL Builders from the respondent upon presentation of a winding-up petition.

[11] Learned counsel for the appellant contended otherwise, arguing that
E the provisions on undue preference under the Companies Act are not applicable as the liquidator was not involved. It was submitted that it was for the liquidator to satisfy himself whether the payment to be made to the appellant amounted to undue preference, and not for the respondent.

[12] Reliance was placed on *JCT Limited v. Muniandy Nadasan & Ors And*
F *Another Appeal* [2016] 3 CLJ 692 where this court, after taking into account the Federal Court decision in *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1998] 4 CLJ 557 agreed that it is the liquidator who may decide whether there is undue preference under s. 293 of the Companies Act read together with s. 53 of the Bankruptcy Act.

G **[13]** In considering the scope of s. 293 of the Companies Act, the Federal Court in *Diamond Leasing* (*supra*) observed:

> We must now turn to consider s. 293 of the Companies Act. The law relating to fraudulent preferences is set out in s. 53 of the Bankruptcy Act, which is made applicable to companies by s. 293 of the Companies Act,
H and is designed to preserve the sanctity of the *pari passu* principle by which creditors in a winding up share rateably in the assets available for distribution …
>
> To take the matter further, it is clear law that the Court has no power to make an order setting aside payments and transfers made in the run-
I up to bankruptcy in favour of a particular creditor which were designed to prefer him over other creditors unless the following five conditions are satisfied: …

> The onus was, of course upon the Liquidator to satisfy **all** the five requirements aforesaid …
>
> The principle of central importance underlying s. 293(1) of the Act is that where a debtor company, has at a **relevant time**, given a preference to any person, the Liquidator may apply to the court for an order under the section setting aside the preference.
>
> (emphasis added)

[14] In the instant case, the liability of the respondent to make payment is imposed by statute, ie, by s. 30(3) of CIPAA. Thus, payment made by the respondent to the appellant would not be from the assets of BHL Builders, but because the adjudicated sum is paid by the respondent, it will be a debt due from BHL Builders to the respondent (once the respondent makes direct payment to the appellant) which the respondent will have to recover from BHL Builders pursuant to sub-s. 30(4).

[15] We agree with learned counsel for the appellant that a legal obligation to pay may arise either by statute (as in the present case) or by contract. In fact, an obligation imposed by statute, in this case by sub-s. 30(3) of CIPAA, is stronger because in the absence of proof of payment by BHL Builders as requested by the respondent under sub-s. (2), it becomes mandatory for the respondent as the principal to pay the adjudicated sum of RM9,065,335.67 to the appellant. It is a requirement of law which the respondent has no discretion not to comply with it.

[16] We are also in agreement with learned counsel for the appellant that s. 30 of CIPAA creates an independent statutory obligation on the part of the respondent, as a principal in its own right, to pay the appellant and that this is a separate obligation to pay imposed by statute which exists in parallel with BHL Builder's obligation as the main contractor to pay the appellant under the adjudication decision.

[17] To support his argument that the direct payment by the respondent to the appellant is permissible despite BHL Builder's status as a bankrupt, learned counsel for the appellant referred us to five authorities, all of which are from beyond our shores. The first case is *Glow Heating Limited v. The Eastern Health Board, Patrick Rooney and Building and Engineering Limited (In Liquidation)* [1988] IR 110 where it was held that a contract provision which requires direct payment from the principal creates an independent liability on the part of the principal, notwithstanding that the main contractor was in liquidation.

[18] The second case is *Golden Sand Marble Factory Ltd v. Easy Success Enterprise Ltd & Anor* [1999] 2 HKC 356. In this case, it was agreed that all future payments in relation to the nominated subcontractors' works would be paid directly by the employer to the subcontractors. The main contractor was later wound up. The Hong Kong Court of first instance granted a declaration that the subcontractor was entitled to the whole sum due under

A the final account from the employer on the basis that as at the date of liquidation, no property in the money in dispute was vested in the main contractor and therefore the money did not become part of the fund for distribution to creditors *pari passu*.

B **[19]** The third case is *Veitchi Co v. Crowley Russell & Co* [1972] SC 225 where it was held that a supervening liquidation did not render unenforceable the requirement of condition 30 as to payment of a subcontractor by a principal as a condition of receiving any further certificate.

C **[20]** The fourth case is *Re Wilkinson Ex parte Fowler* [1905] 2 KB 713 which held that the power conferred by the clause which allows the engineers to order direct payment was not annulled or revoked by the main contractor's bankruptcy and that the appellant by virtue of the two orders of the engineer was entitled to be paid directly.

D **[21]** The last case is *Gericevich Contracting Pty Ltd (in liq) v. Sabemo (WA) Pty Ltd* (1984) 9 ACLR 452. In this case, the Supreme Court of Western Australia sanctioned direct payment to the subcontractor following the main contractor's liquidation on the basis that the employer's debt to the main contractor was for the balance of any amount due after the subcontractor had been paid.

E **[22]** These authorities are only of persuasive value but they do in our view support the appellant's contention that despite BHL Builder's status as a bankrupt, the respondent is bound by statute, ie, by s. 30(3) of CIPAA, to make direct payment to the appellant of the adjudicated sum of RM9,065,335.67.

F **[23]** We cannot accept learned counsel for the respondent's argument that the mandatory nature of sub-s. 30(3) of CIPAA only works to compel an able principal to be bound by an adjudication decision but not to have the liberty to contract out of such obligation. Such argument is contrary to what the subsection provides for.

G **[24]** It was for the reasons aforesaid that we found the learned High Court Judge to be wrong when he held (1) that there is no independent obligation and liability imposed on the respondent to make direct payment to the appellant; and (2) that payment by the respondent to the appellant would amount to preferential payment in view of the fact that the main contractor, H BHL Builders, was in liquidation.

[25] Accordingly, we allowed the appeal and set aside the decision of the High Court. We allowed costs in the sum of RM20,000 to the appellant, subject to payment of the allocator fee.

I